Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1470

MARY FRANCIS LOPEZ,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

MARY FRANCIS LOPEZ,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Mary Francis Lopez, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in case number 78-5511, United States of America, Plaintiff-Appellee, v. Mary Francis Lopez, Defendant-Appellant.

OPINIONS BELOW

The opinions and judgments of the United States Court of Appeals for the Fifth Circuit and of the Unit-

years in confinement suspended, with Petitioner to be on probation for two years with a fine of ONE THOUSAND AND NO/100 ($1,000.00) dollars.

It is the denial of the motion to quash the jury that Petitioner asserts in this appeal as error by the trial court.

In a *Per Curiam* opinion of January 24, 1979, a Panel of the Court of Appeals affirmed the decision below. Petitioner asserts that the Panel erred in affirming the decision, as such affirmance conflicts with prior Supreme Court decisions.

Statement of Facts

The facts show that there are a substantial number of Spanish surnamed people in the Division of the District Court in which this case was tried. The U.S. Census figures for 1970 show the percentage of Spanish surnames amounts to 20.5% (Defendant's Exhibit 8). The school enrollment for the area shows the percentage to be 30.9% (Defendant's Exhibit 6).

The Marshall's Summon's List and Jury Attendance lists (2nd Supp. Record on Appeal) as summarized by the attached Ratio Tables (Appendix D) reflect that only 4.3% of those called for jury service from August, 1971, (the date the "Jury Wheel" selection plan for the Northern District of Texas was approved by the Fifth Circuit Judicial Council) through time of trial in 1978 had Spanish surnames.

REASONS FOR GRANTING THE WRIT

The Honorable Panel of the Fifth Circuit Court of Appeals erred in affirming the conviction of Petitioner and the denial by the District Court of Petitioner's Motion to Quash the Jury Panel which was based on Constitutional grounds that Mexican-Americans were systematically excluded from jury service.

A citizen accused has guaranteed to him under the Constitution the most basic right known to our system of government: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury . . ." U.S. Constitution, Sixth Amendment (Emphasis Added). A jury drawn from a system that excludes a class of individuals by reason of race, especially when the accused is a member of that class, is not such an impartial jury. *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972).

Mexican-Americans are members of a class which has been recognized as "identifiable" for purposes of determining racial exclusion. *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.

Petitioner, a Mexican-American, moved to quash the petit jury based upon her constitutional right to an impartial jury. Through statistical as well as opinion, reputation, and other proof. she established that a

significant portion of the population of the Lubbock Division, Northern District of Texas, were Mexican-American. Census figures place the percentage at 20.5%. Testimony of witnesses placed it higher, and demonstrated that the percentage was rising. Likewise, Petitioner demonstrated that the percentage of those summoned by the U.S. Marshall averaged 4.3%.

Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498, establishes the rule to be applied in determining whether a jury selection procedure passes constitutional muster where race is a factor:

> "In order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. . . . *Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose,* and the burden then shifts to the State to rebut that case." (Emphasis added) *Castaneda, supra* 430 U.S. at 494, 495.

In the case at bar, defendant has quite clearly shown such a substantial underrepresentation; yet the Government has utterly failed to rebut the evidence and the prima facie case.

Castenada establishes a two-prong basis for determination of the prima facie case: first, that the group is a recognizable, distinct class; and second, that the underrepresentation be proved over a significant period of time, by comparison of percentages of the class in the general population to the percentage of the class included in the jury selection process. 430 U.S. at 494.

Castaneda establishes another element that may be proved to support the claim of discriminatory practice: proof of a system not racially neutral. "Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral *supports the presumption of discrimination raised by the statistical showing.*" (Emphasis added). *Castaneda, supra,* 430 U.S. at 494. Herein lies the error of the Panel in its *Per Curiam* decision: it failed to distinguish a prima facie showing and presumption of discrimination from the shifting of the burden of proof to the Government. The Panel says that *Castaneda* requires a showing of intentional discrimination; yet the case holds that the *presumption* of discrimination has arisen prior to any need for a showing of intent.

The proof in *Castaneda* was primarily that of statistics. The Court agreed that these statistics established a prima facie case of discrimination. In the very next sentence, the Court stated: "*Supporting* this *conclusion* is the fact that the Texas system of selecting grand jurors is highly subjective." (Emphasis added) 430 U.S. at 487. The conclusion of discrimination had already been made from statistical evidence. The same conclusion

exists in the case at bar. Seven years of grossly disproportionate percentages cannot be ignored. Yet the Government has attempted to do so.

The Supreme Court has had occasion to write on this subject in the context of sex discrimination in *Duren v. Missouri*, ____ U.S. ____, 47 Law Week 4089 (1979). That case held a Missouri jury selection system which allowed women to "opt out" of jury service was fatally defective due to the consistently disproportionate numbers of women on venires. *Duren* repeats the requisite of *Castaneda*, and yet it adds another method of proof of discriminatory system. That proof exists in showing a *consistent, continuing exclusion* of the class from the venires. Mr. Justice White, writing for the Court states:

> "[Duren's] undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic — that is, inherent in the particular jury-selection process utilized . . . The resulting disproportionate and consistent exclusion of women from the jury wheel and at the venire stage was quite obviously due to the *system* by which juries were selected. Petitioner demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria —

> whether the automatic exemption for women or other statutory exemptions — as implemented in Jackson County." 47 Law Week at 4091.

Where Duren proved a disproportion weekly for one year, Petitioner has proved such exclusion for *seven* years.

The exclusion in *Duren* was systematic; yet the Court did not make any requirement of intent, as would the Panel's decision in the instant case. On the contrary, the low percentage of women in *Duren* probably came from the ability of the women to "opt out" of the jury pool. This shows no "intent" on the part of the state; yet that selection procedure was declared unconstitutional.

The Panel also cites *United States v. Arlt*, 567 F.2d 1295, as somehow controlling. Notwithstanding the fact that the true holding of the case was that no appellant is entitled to two appeals, and that the judgment was "Appeal dismissed," the dicta in the case is not relevant to the case at bar. There, Arlt failed to prove that a cognizable class was systematically excluded from the jury selection process. Here, the evidence is overwhelming that such a systematic exclusion exists. Here, the system *is* the problem. The Panel is correct in that appellant does not contend that the District Clerk discriminated in making up the jury panels. But, as noted in *Castaneda*, "sometimes a clear pattern, unex-

plainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." 430 U.S. at 493. Even though the Mexican-American community may and even has succeeded in electing a Mexican-American representative to the State Legislature, who testified at trial (Vol. 2, Tr. 28-37), such limited successes are inapplicable to a determination of discrimination under any "ruling party" theory. *Castaneda, supra.*

The court in *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966) incorporated by a footnote a quote from *United States v. Greenberg*, 200 F.Supp. 382 (S.D.N.Y., 1961):

> "The test is not whether voter registration lists are used, exclusively or otherwise, as a source of qualified jurors. The test is whether or not the use of such lists results in an array which is a representative cross-section of the community or from which a cognizable group or class of qualified citizens is systematically excluded.

Further, as the court stated in *Camp v. United States*, 413 F.2d 419 (5th Cir. 1969):

> "Use of such lists (voter registration) as the sole source of names for jury duty is constitutionally permissible unless the system results in the systematic exclusion of a cognizable group or class of qualified citizens."

Therefore, the dicta in *Arlt* is inapplicable; the system must *result* in a constitutionally fair and impartial venire and jury.

The system here creates a substantial variance between the proportion of the Mexican-Americans in the general population and the proportion appearing in the jury panels. The Government has failed entirely to rebut the prima facie case of discrimination. The Panel *Per Curiam* decision, if allowed to stand, would substantially alter the rule as set forth by the Supreme Court; that it is the Government that must provide the accused with an impartial jury made up of her peers, and one drawn from all segments of society, including the race in which she is included. The Government has failed to do this; it has failed to rebut the presumption of discrimination established by defendant's evidence.

CONCLUSION

Petitioner respectfully submits that this Court should grant her petition for writ of certiorari and review the decisions of the courts below, and upon hearing reverse the decision below.

Respectfully submitted,

MARK SMITH &
ASSOCIATES
1220 Broadway, Suite 1820
Lubbock, Texas 79401

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the Honorable Wade H. McCree, Jr., Solicitor General of the United States, Department of Justice, Washington, D.C., 20530; and one copy to the Honorable Roger McRoberts, Assistant United States Attorney, C-201, U.S. Courthouse, 1205 Texas Avenue, Lubbock, Texas 79401, by placing the same in the United States Post Office, first class postage prepaid, said service being made in compliance with United States Supreme Court Rule 33.

_____

Mark Smith

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

Docket No. CR-5-78-0008

United States of America

versus

MARY FRANCIS LOPEZ

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date JULY 6, 1978.

WITH COUNSEL Mark Smith (Hired)

PLEA
X NOT GUILTY

There being a verdict of GUILTY by jury, 6/16/78.

FINDING & JUDGMENT
Defendant has been convicted as charged of the offense(s) of Obstruction of Correspondence, in violation of Title 18, United States Code, Section 1702.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS. The execution of said sentence of imprisonment is hereby suspended and defendant placed on probation for a period of TWO (2) YEARS.

In addition, defendant is fined the sum of $1,000.00 to be paid on or before August 1, 1978, and to be paid through the U.S. Probation Office.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

/s/ HALBERT O. WOODWARD
HALBERT O. WOODWARD
Chief U.S. District Judge
Date July 6, 1978

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

versus

Mary Frances LOPEZ,
Defendant-Appellant.

No. 78-5511

Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 24, 1979.

Appeal from the United States District Court for the Northern District of Texas.

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* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Before CLARK, RONEY and GEE, Circuit Judges.

PER CURIAM:

Mary Frances Lopez was convicted of the intentional obstruction of correspondence in violation of 18 U.S.C. § 1702. During her trial, Lopez filed a motion to quash the petit jury panel, contending that the procedures by which jurors were selected impermissibly discriminated against Mexican-Americans. Lopez rested her claims of discrimination squarely on constitutional grounds; she did not contend that the procedures used by the district court violated the Jury Section and Service Act of 1968, 28 U.S.C. §§ 1861-1874. Lopez contends that the district judge erroneously denied her motion. We affirm.

In order to establish a prima facie case of discrimination in the selection of jurors, a defendant must show (1) that the group allegedly discriminated against "is one that is a recognizable, distinct class singled out for different treatment under the laws, as written or as applied," (2) that the group is underrepresented on jury panels over a significant period of time, and (3) that the selection procedure is not racially neutral or is susceptible to being used as a tool of discrimination. *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498, 510 (1977).

The district court in which Lopez was tried uses voter registration lists to select potential jurors, as ex-

pressly authorized by § 1863(b)(2). The defendant's claim of discrimination rested entirely on statistics showing that the percentage of Mexican-Americans selected for jury panels was less than the percentage of Mexican-Americans in the entire population for the district. The district judge concluded that this underrepresentation was due solely to the fact that fewer Mexican-Americans register to vote than do other groups within the community.

The evidence Lopez adduced to support her claim of discrimination failed to meet the third requirement set down in *Castaneda*. Lopez does not contend that the district court clerk discriminated against Mexican-Americans in making up the jury panels from the voting lists, nor does she contend that Mexican-Americans have been discriminated against in the voter registration process. *Castaneda* requires that a defendant show that the exclusion of a particular minority group from jury service is due to some form of intentional discrimination; "an official act is not unconstitutional solely because it has a racially disproportionate impact." *Castaneda, supra*, 430 U.S. at 493, 97 S.Ct. at 1279, 51 L.Ed.2d at 509; *see Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597, 607 (1976). A prima facie case of discrimination cannot rest merely on statistics. The fact that an identifiable minority group votes in a proportion lower than the rest of the population and is therefore underrepresented on jury panels presents no constitutional

issue. *United States v. Arlt*, 567 F.2d 1295, 1297 (5th Cir. 1978).

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

February 21, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5511 — UNITED STATES OF AMERICA v.
MARY FRANCIS LOPEZ

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ SALLY HAYWARD
Deputy Clerk

APPENDIX D

TABLE OF RATIOS

RATIO AND PERCENTAGES OF SPANISH SURNAMES CALLED FOR PETIT JURY SERVICE IN THE LUBBOCK DIVISION OF THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FOR THE PERIOD OF AUGUST, 1971, UNTIL JUNE, 1978.

Figures under the column entitled Ratio refer to the ratio of Spanish surnames in proportion to the total number of individuals called.

Figures under the column entitled Page refer to pages in the second supplement to the record on appeal, where the particular jury list may be found.

MARSHALL'S SUMMONS LIST

1971

DATE	RATIO	PAGE
8-9-71	4/60	299-300
10-18-71	1/35	289
11-1-71	4/15	297

1971 Total 5/110 = 4.5%

JURY ATTENDANCE LIST

1971

DATE	RATIO	PAGE
8-16-71	4/60	301-303
10-18-71	1/45	290-292
11-1-71	0/15	298

1971 Total 5/120 = 4.1%

MARSHALL'S SUMMONS LIST

1972

DATE	RATIO	PAGE
1-4-72	3/60	281-282
2-21-72	2/50	274-75
4-3-72	5/60	264-65
5-16-72	2/60	256-57
7-18-72	5/60	249-50
10-2-72	2/33	243

1972 Total 19/323 = 8.2%

1973

1-8-73	6/50	229-30
3-19-73	9/15	236
7-30-73	3/40	216
9-10-73	4/6	222
9-10-73	3/35	223-24
10-29-73	3/50	200-01

1973 Total 15/205 = 7.2%

JURY ATTENDANCE LIST

1972

DATE	RATIO	PAGE
1-4-72	3/60	286-288
2-21-72	2/50	276-78
4-3-72	5/60	266-69
5-16-72	2/58	258-60
10-2-72	3/58	244-46

1972 Total 15/286 = 5.2%

1973

1-8-73	6/50	231-33
3-19-73	1/41	239-40
7-3-72	3/40	220-21
9-10-73	2/40	227-28
10-29-73	3/48	202-04

1973 Total 15/219 = 6.8%

MARSHALL'S SUMMONS LIST

1974

DATE	RATIO	PAGE
1-7-74	1/45	210-11
3-18-74	4/10	186
5-6-74	1/40	195
9-9-74	0/10	174
9-9-74	0/40	173
11-11-74	0/10	165
11-4-74	0/40	164

1974 Total 2/205 = .09%

1975

2-17-75	0/10	155
5-12-75	1/25	149
7-14-75	1/45	141-42
9-15-75	0/15	130
9-17-75	0/30	132
11-10-75	1/75	114-15
11-24-75	4/15	116
12-1-75	1/37	127
12-8-75	4/27	129

1975 Total 4/279 = 1.4%

JURY ATTENDANCE LIST

1974

DATE	RATIO	PAGE
1-18-74	1/44	212-13
3-8-74	1/44	187-88
5-6-74	1/43	196-97
9-9-74	0/50	175-77
11-11-74	0/50	170-72

1974 Total 3/260 = 1.2%

1975

2-17-75	0/50	157-59
5-12-75	1/48	152-54
7-14-75	1/53	143-45
9-16-75	1/81	127-140
11-10-75	4/85	117-120

10a

MARSHALL'S SUMMONS LIST

1976

DATE	RATIO	PAGE
1-5-76	0/55	103-04
7-12-76	1/40	91-92
8-2-76	0/20	82
10-26-76	1/30	80-81

1976 Total 2/145 = 1.4%

1977

3-14-77	1/50	53-54
5-16-77	2/20	73
8-1-77	4/50	36-37
12-12-77	0/30	29-30
10-17-77	3/60	44-46

1977 Total 10/210 = 4.8%

JURY ATTENDANCE LIST

1976

DATE	RATIO	PAGE
1-14-76	0/72	106-109
5-9-76	0/49	96-98
7-12-76	1/39	99-100
8-2-76	0/55	83-85
9-27-76	0/54	88-89

1976 Total 1/175 = 0.6%

1977

3-14-77	3/74	64-69
3-14-77	4/104	55-58
8-1-77	5/66	41-43
10-17-77	6/45	47-49
12-12-77	2/58	31-33

1977 Totals 20/347 = 5.7%

11a

MARSHALL'S SUMMONS LIST

1978

DATE	RATIO	PAGE
1-10-78	4/50	11-12
1-10-78	0/10	14
6-12-78	2/20	3
6-12-78	6/50	1-2

1978 Total 12/130 = 9.2%

OVERALL TOTAL 69/1608 = 4.3%

JURY ATTENDANCE LIST

1978

DATE	RATIO	PAGE
1-10-78	4/61	15-18
3-6-78	3/55	24-26
4-3-78	2/32	22-23
6-12-78	6/71	4-7

1978 Total 15/219 = 6.8%

OVERALL TOTAL 84/1643 = 5.1%